SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~5750~~ 70-5014

PETER STANLEY, SR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
QUESTION PRESENTED	3
STATEMENT	4
SUMMARY OF ARGUMENT	6
ARGUMENT:	
The failure of the Illinois Juvenile Court Act to consider Peter Stanley, an unwed father of two illegitimate children whom he had voluntarily acknowledged, supported and established a familial relationship with and neither neglected nor abused and whose mother had died, as a parent denied him equal protection of the laws	9
A. The interest of an unwed father in continuing after his common-law wife's death, to be able to rear his children free from unwarranted governmental interference is fundamental and there is no compelling justification for nor necessity of the State interfering with this fundamental interest by the drastic means of declaring every unwed father a legal stranger to his child	19
B. The Juvenile Court Act's classification of unwed fathers as non-parents is violative of the Equal Protection Clause for it is not rationally related to any reasonably conceived, legitimate state interest	23
1. The purpose of the classification of unwed fathers as non-parents was not to serve the best interests of children and the classification is not rationally related to that asserted purpose	25

2. Classification of unwed fathers as non-parents actually disserves the purpose of better administering the Adoption Act 33

CONCLUSION 36

APPENDIX I 37

INDEX TO APPENDIX II 49

APPENDIX II 51

APPENDIX III 67

TABLE OF CITATIONS

Cases:

Buck v. Bell, 274 U.S. 200 (1927) 23

Boddie v. Connecticut, 38 U.S. Law Week 4294 (3/2/71) 26

DePhillips v. DePhillips, 35 Ill. 2d 154, 219 N.E. 2d 465 (1966) 14

Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968) 21

Goeseart v. Cleary, 335 U.S. 464 (1948) 20

Griswold v. Connecticut, 381 U.S. 479 (1965) 23

In Re Gault, 387 U.S. 1 (1967) 32

In Re Richards, 328 Ill. App. 591, 66 N.E. 2d 512 (1st Dist., 1946) 15

Levy v. Louisiana, 391 U.S. 68 (1968) 19

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) . . . 20, 24

McDonald v. Bd. of Election Commissioners, 394 U.S. 802 (1969) 20, 24

McLaughlin v. Florida, 379 U.S. 184 (1964) 19

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

People ex rel. Noonan v. Wingate, 376 Ill. 244, 33 N.E. 2d 467 (1941) 15

Petition of Kollman, 10 Ill. App. 2d 336, 134 N.E. 2d 629 (1956) 15

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 16

Reynolds v. Sims, 377 U.S. 533 (1964) 20

Rinaldi v. Yeager, 384 U.S. 305 (1966) 19, 23

F.S. Royster Guano v. Virginia, 253 U.S. 412 (1920) 23

Shapiro v. Thompson, 394 U.S. 618 (1969) 19, 23

Skinner v. Oklahoma, 316 U.S. 535 (1942) 19, 21

Thorpe v. Thorpe, 48 Ill. App. 2d 455, 198 N.E. 2d 743 (4th Dist., 1964) 10

Vanderlaan v. Vanderlaan, 126 Ill. App. 2d 416, 262 N.E. 2d 717 (1st Dist., 1970) 14

Wallace v. Wallace, 60 Ill. App. 2d 300, 210 N.E. 2d 4 (1st Dist., 1965) 14, 34

Winslow v. Lewis, 15 Ill. App. 2d 65, 144 N.E. 2d 782 (2nd Dist., 1957) 15

Statutes:

(Within the text of the Brief, the Illinois Juvenile Court Act, Ill. Rev. Stat., Ch. 37, §§ 701-804 (1969) will be referred to simply as Juvenile Court Act.)

Juvenile Court Act, § 1-2; Ill. Rev. Stat., Ch. 37, § 701-2 (1969) 25

Juvenile Court Act, § 1-4; Ill. Rev. Stat., Ch. 37, § 701-4 (1969) 12

Juvenile Court Act, § 1-11; Ill. Rev. Stat., Ch. 37, § 701-11 (1969) 11

Juvenile Court Act, § 1-12; Ill. Rev. Stat., Ch. 37, § 701-12 (1969) 11

Juvenile Court Act, § 1-14; Ill. Rev. Stat., Ch. 37, § 701-14 (1969) 3, 12, 16

Juvenile Court Act, § 1-16; Ill. Rev. Stat., Ch. 37, § 701-16 (1969) 11, 16

Juvenile Court Act, § 1-20; Ill. Rev. Stat., Ch. 37, § 701-20 (1969) 11

Juvenile Court Act, § 2-4; Ill. Rev. Stat., Ch. 37, § 702-4 (1969) 10

Juvenile Court Act, § 2-5(1)(a); Ill. Rev. Stat., Ch. 37, § 702-5(1)(a) (1969) 3, 12

Juvenile Court Act, § 4-1(1)(a); Ill. Rev. Stat., Ch. 37, § 704-1(1)(a) (1969) 11

Juvenile Court Act, § 4-6; Ill. Rev. Stat., Ch. 37, § 704-6 (1969) 11

Juvenile Court Act, § 4-8; Ill. Rev. Stat., Ch. 37, § 704-8 (1969) 12, 18

Juvenile Court Act, § 5-1; Ill. Rev. Stat., Ch. 37, § 705-1 (1969) 13

Juvenile Court Act, § 5-2; Ill. Rev. Stat., Ch. 37, § 705-2 (1969) 13

Juvenile Court Act, § 5-7; Ill. Rev. Stat., Ch. 37, § 705-7 (1969) 11, 13, 14

Juvenile Court Act, § 5-8; Ill. Rev. Stat., Ch. 37, § 705-8 (1969) 13, 15

Juvenile Court Act, § 5-9; Ill. Rev. Stat., Ch. 37, § 705-9 (1969) 11, 17

Juvenile Court Act, § 1-10; Ill. Rev. Stat., Ch. 37 § 701-10 (1969) 13

Ill. Rev. Stat., Ch. 4, § 9.1-6 (1969) 17, 21

Ill. Rev. Stat., Ch. 4, § 9.1-8 (1969) 10, 31

Ill. Rev. Stat., Ch. 17, § 13 (1949) 34

Ill. Rev. Stat., Ch. 38, § 11-7, 8 (1969) 10

Ill. Rev. Stat., Ch. 106-¾, § 62 (1969) 13, 34

42 U.S.C. § 416(a)(3) (1965) 27

Other Authorities:

Anglim, The Adopted Child's Heritage—Two Natural Parents, 44 Child Welfare 339 (1969) 36

Anthony & Benedek (eds.), Parenthood (1970) 30

Burgess, The Unmarried Father in Adoption Planning, 15 Children 71 (March-April, 1968) 36

Comment, 1968 Ill. L. Forum 232 (1968) 30, 36

Dobson, The Juvenile Court and Parental Rights, 4 Family L.Q. 393 (1970) 31

Father of an Illegitimate Child–His Right to be Heard, 50 Minn. L. Rev. 1071 (1966) 31

A. Freud & Burlingham, War & Children (1944) 30

Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana–First Decisions on Equal Protection and Paternity, 36 U. Chi. L.R. 338 (1969) 20

Murphy, N.L.A.D.A: Juvenile Court Project, 27 Legal Aid Briefcase 223 (June, 1969) 32

1946 Op. Ill. Att'y. Gen. 58 34

Report of Illinois White House Conference on Children and Youth (May, 1970) 33

Rights of a Father Toward His Illegitimate Children in Illinois, 46 Ill. L. Rev. 156 (1951) 34

Schneider, American Kinship–A Cultural Account (1968) 22

Spitz, The First Year of Life (1965) 30

The Children are Waiting, 5 Perspective 4 (March, 1969) 32

Trumbell, Proposed New Juvenile Court For Illinois, 53 Ill. Bar. J. 608 (1965) 34

Young, Out of Wedlock (1954) 22

Young, Placement From a Child's Point of View, 31 Social Casework 250 (1950) 30

U.S. Children's Bureau, Dep't. of Health, Education & Welfare, The Unmarried Father–Demonstrations & Evaluation of an Assertive Casework Approach (1967) 36

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported officially and unofficially, respectively in 45 Ill. 2d 132 and 256 N.E. 2d 814. A copy of the opinion appears in the Appendix. (A. 31-33) The trial court, Circuit Court of Cook County (Chicago, Illinois), Juvenile Division, rendered no opinion.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on 24 March 1970 which affirmed the Circuit Court of Cook County, Juvenile Division's ruling of 6 May 1969 in which the Petitioner's two children, Peter, Jr. and Kimberly Stanley, were adjudicated dependent children. A rehearing of the Illinois Supreme Court decision was not sought. The only issue raised by Mr. Stanley in the Illinois Supreme Court was whether the Illinois statutory scheme which denied to him, an unwed father, any rights to his children, denied him the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. Although the equal protection argument was first specifically articulated on appeal to the Supreme Court of Illinois, this federal question was timely and properly raised so as to give the Supreme Court of Illinois and this Court jurisdiction to review the judgment since the Illinois rule is that "any error of law affecting the judgment or order appealed from, may be brought up for review in any civil case," Illinois Supreme Court Rule 366(b)(1) (Ill. Rev. Stat., Ch. 110 A, Sec. 366 (b)(1) (1969). Also see, Ill. Rev. Stat., Ch. 110, Sec. 64(3) (1969) and Ill. Rev. Stat., Ch. 110 A, Sec. 366(b)(3)(1) (1969). Furthermore, neither party nor the Supreme Court of Illinois, at argument or in its opinion, suggested that the federal question was not timely and properly raised and the Supreme Court of Illinois's affirmance of the judgment of the Circuit Court rests specifically upon a negative answer, in the first three paragraphs of its decision, to the question which Stanley seeks to have reviewed by this Court. Therefore, jurisdiction properly rests with this Court. *Boykin v. Alabama*, 395 U.S. 238, 241-242 (1969).

The jurisdiction to review the final judgment and decree of the Illinois Supreme Court is conferred upon this Court by Title 28, United States Code, Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment, XIV, Section 1:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Juvenile Court Act, Sec. 2-5(1)(a):*

"*Dependent Minor.*) (1) Those who are dependent include any minor under 18 years of age (a) who is without a parent, guardian or legal custodian; . . ."

Juvenile Court Act, Sec. 1-14:

"*Parents.*) 'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect of the minor have been terminated in any manner provided by law."

QUESTION PRESENTED

Whether an Illinois statutory scheme which discriminates against the surviving unwed natural male parent of properly maintained, illegitimate children by providing that such surviving unwed male parent shall be excluded from the statutory definition of "parents" and, hence, have no rights to his children denies surviving unwed natural fathers the equal protection of the laws where this discriminatory treatment has no rational or reasonable basis?

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*Each section of the Juvenile Court Act cited in this Brief is reprinted in full in Appendix I of this brief.

STATEMENT

On 6 May 1969 Peter Stanley, Jr. and Kimberly Stanley, ages 2½ years and 6 months at that time, were adjudicated dependent children and made wards of the Circuit Court of Cook County (Illinois), Juvenile Division (hereafter juvenile court). The actual trial takes up less than eight pages of the transcript. (A. 18-23)

The only witness to testify for the State was a court employed probation officer, Lucille Glenn. She testified that she had sought marriage verification at the Bureau of Vital Statistics for the years 1949 through 1951 and was unable to find any proof that Peter and Joan Stanley had been married. (A. 19-20) On cross examination Mrs. Glenn stated that Karen Stanley (a daughter of Peter Stanley, 17 years old at the time) had told her that Peter Stanley had not always lived continuously with Joan Stanley but that he had been living continuously with Joan Stanley from the time Kimberly and Peter Jr., were born. (A. 21) Peter Stanley later testified subject to cross examination that he had been living with Joan Stanley for 18 years. (A. 22)

Peter Stanley testified without contradiction that he was the father of Peter, Jr. and Kimberly Stanley. He further testified he had been living with Joan Stanley for 18 years at the time of her death and continued to live with his children after her death. He stated that about two months prior to the trial he had arranged for friends, Mr. & Mrs. Ness, whom he had known for ten or twelve years, to care for the children. (A. 22) Mrs. Glenn told the juvenile court that the children were receiving good care at the Ness home (A. 10), that there was a lot of emotional love in the home, (A. 18) and that the Ness' should be appointed guardians. (A. 18)

The Assistant State's Attorney, Mr. DiNatale, stated that he would stipulate to Peter Stanley's testimony although he thought Stanley had not been under oath. Mr. DiNatale pointed out that common law relationships had been aban-

doned in Illinois and in Indiana (A. 23). A finding of dependency followed and Mr. & Mrs. Ness were appointed guardians of the children. (A. 23)

There was discussion both before and after the trial about the circumstances that would allow Stanley to have his children returned to him. The court stated before the trial that Stanley could file a petition, presumably to vacate a judgment of dependency. However, the court added that Stanley had no legal parental right to do so and his legal position would be the same in six months as it was at that time. (A. 16-17) After the trial the court said that Peter Stanley was not foreclosed from filing a petition at any subsequent time to establish some parental or guardianship rights over the children and that the court would consider this petition at that time. (A. 23)

Prior to the trial the probation officer told the court that if there were a finding of dependency, the children would quite obviously have no legal parent. She went on to state that Stanley was not in a position financially to provide properly for the children but in the future, if he developed a proper plan "we would have to consider it at that time. I cannot say." (A. 17)

Assistant State's Attorney DiNatale stated:

> "We are not alleging that any neglect really, Your Honor, but there is a situation where we have a natural father and there is the mother, is sole and only legal parent deceased;
>
> "The children are dependent under the Statute. If the father comes in at a later date I mean the natural father, although not the legal, and I have this situation, and the Probation Department checks it out, and in that case it would be up to the Court to determine at that time whether or not the children should be returned to the father." (A. 17)

After the trial DiNatale stated that Stanley had no rights but only liabilities, but that the State had attempted to grant him rights by giving him a choice of guardian. He

also said that if Stanley made some progress and "was to marry and establish an orderly family situation that in all probability if he petitioned the court, he would have the children back." (A. 29-30)

SUMMARY OF ARGUMENT

The Illinois Juvenile Court Act confers the status of parent upon all natural mothers, wed or unwed, all natural fathers who are wed and all adoptive parents. The State of Illinois grants to these parents great freedom to raise their children and will remove children from the custody and control of their parents in only a limited number of circumstances. The most common form of governmental interference in the child rearing process which can result in removal of the child from the parent's custody and control is a Neglected Minor proceeding under the Juvenile Court Act. Before a child may be taken from its parent through such a proceeding, the State must prove not only that the child has been neglected but it must be shown that the parent is unfit or unable, for other than financial reasons, to care for the child.

Illinois does not confer the status of parent upon any unwed natural father. Even those unwed fathers who voluntarily acknowledge, support, establish a familial relationship with and neither neglect nor abuse their children are not parents, but are considered legal strangers to their children. Interestingly, as long as the child's mother is alive and wishes the natural father to be the father, the State of Illinois will not interfere with his exercise of custody and control over the children except upon the same terms that it would interfere with the custody and control of those persons the State labels parents. Once, however, the mother dies or leaves the children alone with the unwed father, the unwed father's legal status as a stranger to his children becomes operative. In order for him to again obtain the custody and control of the children he has willingly recognized as his own the unwed father must not

merely demonstrate he has acknowledged, supported, established a familial relationship with and not neglected his children but must show he is a suitable person to be a parent. Unfortunately, the latter term or concept is no where defined and the mere fact an unwed father has been a suitable parent prior to his common-law wife's death is without significance.

The State has sought to justify this treatment of the unwed father on several grounds related to the State's general interest of promoting the best interests of children. It is said that the discriminatory treatment of unwed fathers encourages adoption which benefits illegitimate children by allowing then to take intestate estates of their natural fathers and also, allegedly, removes the stigma of illegitimacy. This assertion is, however, unfounded for the State makes it so difficult for an unwed father, especially one who is indigent and remains single, to adopt his children that no unwed father who truly loves and cares for his children would file an adoption proceeding and, thereby, increase the risk his children would be taken from him. Moreover, it is inconceivable that had Illinois truly wished to achieve the goal of giving more illegitimate children intestate estates or removing from them the stigma of illegitimacy it would have chosen such a tenuous, circuitous and irrational way of so doing.

The State also asserts that the classification of unwed fathers as non-parents is justified by the State's wish to locate for parenthood only "suitable" unwed fathers. Another purpose of the classification, found in the legislative history resulting in the classification, is that it increases the administrative efficiency of adoption proceedings. However, neither of these purposes is sufficient to save the classification from unconstitutionality.

This Court has recognized that the relationship created by the presence of biological and familial lines is an important one. Moreover, this Court has held that the right to procreate is a fundamental interest. Certainly, one who has

exercised the right to procreate and has gone on to establish a familial relationship with his biological progeny has a fundamental interest in maintaining that relationship. The State's interest in promoting the administrative convenience of adoption proceedings is not sufficiently compelling to allow interference with this fundamental interest. Moreover, there are less drastic means to locate suitable unwed fathers than the blanket categorization of all unwed fathers as unsuitable to be their children's parents.

Moreover, it cannot be reasonably conceived that the purpose of the classification of unwed fathers as non-parents was meant to serve the purpose of ferreting out suitable unwed fathers. For the statutory scheme operates, as it did here, to deprive unwed fathers of parental control of their children upon a record which the State has characterized, albeit inaccurately, as devoid of information as to the unwed father's suitability for parenthood. Furthermore, the purpose of ferreting out suitable unwed fathers does not promote the interests of children. Severing children from parental images normally is harmful to the child and this is true even where the parent is mediocre. It is also, unfortunately, the case that the State is not in a position to act as a humane *parens patriae* and it cannot be presumed the State is able to provide more suitable parents than unwed fathers who have acknowledged, supported, established a familial relationship with and not neglected their children. Since the statutory classification generally has the harmful effect of separating children from non-neglectful fathers and the State is in no position to find more suitable parents, it is apparent that the classification rather than promote, actually disserves the welfare of minor children.

Prior to 1949, Illinois law allowed the unwed father a right to custody and control of his illegitimate children superior even to that of the mother. However, in 1949, the Illinois General Assembly cut off the unwed fathers rights in order to promote the efficient operation of adoption proceedings. The present classification is merely a codifi-

cation of the prior legislative action. If, however, the statutory classification is to have the effect of encouraging adoption it will only serve to clog the adoption courts with unnecessary cases. More importantly, the statutory classification's purpose of promoting the administrative convenience of adoption proceedings is simply irrelevant to the class of unwed fathers affected by the statute. The classification effects only unwed fathers who have a desire to exert custody and control over their children whereas adoption proceedings are and should be concerned only with children who are not wanted and have no family.

Because the statutory classification of fathers as non-parents has no rational relationship to any reasonably conceived purpose, it is violative of the Equal Protection Clause and its application to Peter Stanley to deprive him of the children he had voluntarily acknowledged, supported, established a familial relationship with and not neglected must be reversed.

ARGUMENT

THE FAILURE OF THE ILLINOIS JUVENILE COURT ACT TO CONSIDER PETER STANLEY, AN UNWED FATHER OF TWO ILLEGITIMATE CHILDREN WHOM HE HAD VOLUNTARILY ACKNOWLEDGED, SUPPORTED AND ESTABLISHED A FAMILIAL RELATIONSHIP WITH AND NEITHER NEGLECTED NOR ABUSED AND WHOSE MOTHER HAD DIED, AS A PARENT DENIED HIM EQUAL PROTECTION OF THE LAWS.

Introduction.

While Joan Stanley, the common-law wife of the Petitioner, Peter Stanley, was alive, wished Peter Stanley to be, and acted as if he was, the father of his children, the State of Illinois could not interfere with or intrude upon Peter Stanley's rearing of his children except under the circumstances the State might interfere with the child rearing of

the parent of a legitimate child.[1] State interference in the child rearing process which can directly result in terminating the familial relationship most commonly takes the form of a Neglected Minor proceeding pursuant to the Juvenile Court Act, § 2-4.[2] In such a proceeding the State would

[1]There is no way the State of Illinois could have forced Peter Stanley to leave his and Joan Stanley's home for the State only punishes adultery and fornication if it is "open and notorious," Ill. Rev. Stat., Ch. 38, § 11-7, § 11-8 (1969). Moreover, the ". . . notoriety must extend not only to the sexual intercourse and cohabitation, but must extend to the fact of the absence of the marital relationship between parties engaging in such behavior." Committee Comments to § 11-7, Smith Hurd Ill. Anno. Stats., Ch. 38, § 11-7, p. 631 (1964). Since Peter and Joan Stanley obviously lived together as in a state of marriage, the State of Illinois had no interest in the mere fact the cohabitation was without the marriage ceremony.

[2]We deal in this case with governmental intrusion upon parental control which can result in removing the child from the custody and control of the parent. Thus, such intrusions as curfew or compulsory attendance laws are not of relevance here. Nor are volitional acts of the child, e.g. commission of crime and subsequent imprisonment, which remove the child from the parent's control relevant. For the classification in question focuses solely upon *the natural parent's own* acts or omissions directly related to his or her suitability or fitness to assume parenthood. A parent's custody and control of his children could also be disturbed pursuant to the provisions of the Illinois Adoption Act, Ill. Rev. Stat., Ch. 4, §§ 9.1-1–9.1-24 (1969). However, unless the mother consented to the adoption there could be no adoption unless the mother were found to be an unfit parent, Ill. Rev. Stat., Ch. 4, § 9.1-8 and 9.1-1. D (1969). A finding of parental unfitness under the Adoption Act requires a higher burden of proof than necessary for a finding of neglect under the Juvenile Court Act for, "In adoption proceedings clear and convincing proof of the unfitness of a natural parent must be supported by the evidence." *Thorpe v. Thorpe*, 48 Ill. App. 2d 455, 198 N.E. 2d 743, 746 (4th Dist., 1964). A criminal proceeding for contributing to the dependency or neglect of children, Ill. Rev. Stat., Ch. 23, § 2361 (1969), or for cruelty to the children, Ill. Rev. Stat., Ch. 23, § 2368 (1969), would, of course, require an even higher standard of proof.

Citations to the Juvenile Court Act will be to the session law section number. The sections are reprinted and cited in full in Appendix I. Citations are to the 1969 codification as there are no differ-

have the burden of proving by a preponderance of the evidence that the children were neglected, § 4-6. The minor could not be removed from the custody of the parent unless there was a showing that the parent was unfit or unable to care for the child for some reason other than financial circumstances alone, § 5-7 (1). Such procedural protections as notice of the nature of the alleged neglect, representation by counsel and the necessity of proof by competent evidence would all be afforded the allegedly erring parent, §§ 1-20, 4-1 (2), 4-6. Moreover, even were the familial relationship terminated by removing the minor from the custody of the parent, the erring parent would retain residual parental rights, including the right to reasonable visitation and the right to determine the minor's religious affiliation, §§ 1-16, 1-11, 1-12, 5-9. Since there was no suggestion here that Peter Stanley's two children, Kimberly and Peter, Jr., had been neglected, there was no way, while Joan Stanley was alive, that Peter Stanley's relationship with his children could have been disturbed by the State.[3] However, when his common-law wife died, Illinois

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ences between the 1967 and 1969 codification of the sections involved in this case.

[3]The State's indication there was no neglect of the minor children, Kimberly and Peter Stanley, Jr., is partieularly significant here. The same judge that presided in the instant case also presided in the case of Karen Stanley, the 17-year-old daughter of the Petitioner, who had been adjudicated neglected. Moreover, the same prosecuting attorney, Mr. DiNatale, represented the State in both proceedings. However, in the proceeding involving Karen Stanley, the same counsel that represented and represents the Petitioner in this cause represented Karen and, in fact, assumed the task of presenting Karen's case. Unfortunately, the Petitioner was not represented by counsel at Karen's proceedings. Interestingly, it was the Probation Officer assigned in the case of Karen Stanley that filed the original unfounded neglect petitions in this case and who, although approving of the Petitioner's temporary placement of his children with the Ness family, did not care for Mr. Stanley's "state of mind" respecting the care of his children and did not believe he was in "a position financially to provide properly for the children."

law operated to convert Peter Stanley from a father who had acknowledged, supported, established a familial relationship with and not neglected his children into a stranger to his children, and in light of his indigence, a disadvantaged stranger.

The statutory scheme employed by the State of Illinois to deny Peter Stanley the fatherhood of his children is simple in its operation. Section 2-5 (1) (a) of the Juvenile Court Act provides that ". . . any minor under 18 years of age . . . who is without a parent . . ." is a Dependent Minor. Section 1-14 of the Act excludes an unwed father from its definition of parents–"'Parents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parents. . . ." Thus, the moment Joan Stanley died, Peter Stanley's children became Dependent Minors and, upon the filing of an appropriate petition in the juvenile court, they were so adjudged and made wards of the Circuit Court of Cook County, Juvenile Division.[4] Since Peter Stanley did not claim a marriage outside the State of Illinois, all that was necessary for there to be an adjudication of dependency and wardship was a demonstration no

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[4] An adjudication of wardship of the Juvenile Court is not always automatic even though a child is found to be delinquent, otherwise in need of supervision, neglected or dependent. "Adjudicatory Hearing," § 1-4, under the Juvenile Court Act involves a two step process –(a) a finding as to jurisdictional facts, § 2-1, i.e. whether a minor is delinquent otherwise in need of supervision, neglected, or dependent and (b) a finding as to whether it is in the best interest of the minor and the public that he should be adjudged a ward of the Court, § 4-8. However, since the operation of the Juvenile Court Act rendered the Petitioner's children without a legal parent, guardian, or custodian upon the death of their mother, obviously the best interest of the child and the public mandated that the Juvenile Court assume wardship of the minors so that a legal custodian or guardian could be appointed. Thus, it was the operation of the Act rendering the minors without a legal parent, guardian or custodian that mandated that the Juvenile Court fill the void and adjudge the minors wards of the Court.

marriage certificate was on file in the Cook County Clerk's Office. Ill. Rev. Stat., Ch. 89, §§ 6, 12 (1969).

The Juvenile Court Act provides that after the children are made wards of the court, a Dispositional Hearing, § 1-10, is held to determine who should have the custody and/or guardianship of the children, §§ 5-1, 5-7. Section 5-7 of the Act provides that a minor may be taken from the custody of his parents if the court finds the legal parents ". . . are unfit or are unable, for some reason other than financial circumstances alone, to care for, protect, train or discipline the minor. . . ." The court may appoint, among others, any ". . . suitable relative or other person . . ." as guardian or custodian, § 5-7 (a). Thus, although Peter Stanley apparently might have been appointed custodian or guardian, he, not being a "parent", did not benefit by the legislature's recognition that financial circumstances alone are an insufficient reason for depriving a parent of the custody, control and society of his children. After the initial disposition, jurisdiction over the minor and the cause is retained by the juvenile court and the court may, after notice to the custodian or guardian, appoint a different custodian or guardian, §§ 5-2 (c) (3), 5-8. The State's argument (Brief For Appellee In Illinois Supreme Court, p. 15) and the opinion below—relying upon the juvenile court's continuing power to change guardians or custodians and upon the fact that the court can appoint any suitable person as guardian or custodian—suggest that the Petitioner might be, or have been, appointed custodian or guardian of his children. At the time of the proceeding below, however, there was neither a theoretical nor practical possibility Peter Stanley could have obtained appointment as custodian or guardian of his children.

At the time of the proceedings below holdings of the Illinois Supreme and Appellate Courts prescribed that the unwed father could obtain custody of his children only by adoption. Section 62 of the Illinois Paternity Act, *Ill. Rev. Stat.*, Ch. 106 3/4, § 62 (1969), provides and provided that

". . . a person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose." Moreover, in *DePhillips v. DePhillips*, 35 Ill. 2d 154, 219 N.E. 2d 465 (1966) the Illinois Supreme Court in reversing a trial court's grant of visitation privileges to an unwed father held that ". . . a putative father should have no right to the society of his illegitimate child." (*Id.* at 158, 219 N.E. 2d at 467). See also, *Wallace v. Wallace*, 60 Ill. App. 2d 300, 210 N.E. 2d 4 (1st Dist. 1965); *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 416, 262 N.E. 2d 717 (1st Dist. 1970). We must assume here, however, the opinion below has *sub silentio* overruled *DePhillips* and limited the effect of § 62 of the Paternity Act and presume that there is and was a theoretical possibility Peter Stanley could be or have been appointed custodian or guardian of his children by the juvenile court. However, admitting a theoretical possibility that the Petitioner could obtain custody or guardianship of his children under the Juvenile Court Act is but the beginning of the inquiry.

Despite this newly created theoretical possibility of Peter Stanley being appointed custodian or guardian under the provisions of the Juvenile Court Act, such appointment was a practical impossibility. The trial court's, prosecutor's and probation officer's comments in the proceedings below indicated only a potential future possibility of such appointment. (A. 15, 16, 17, 18, 22, 29-30). Moreover, Peter Stanley is disadvantaged by his meager financial circumstances even though the Juvenile Court Act specifically refuses to recognize this as a relevant consideration for other "parents", § 5-7. Financial circumstances were emphasized by the probation officer, ". . . I would say that Mr. Stanley is not in a position financially to provide properly for the children," (A. 17). Peter Stanley is further disadvantaged by the fact that he is single and saddled with the opprobrium which attaches to fathers of illegitimate child-

ren. As was noted by the prosecutor in the trial court, ". . . if he (Stanley) did have some progress and was to marry and establish an orderly family situation that in all probability if he petitioned the court, he would have the children back." (A. 29-30). Finally, the Petitioner is disadvantaged in his attempt to obtain custody or guardianship by the fact that Section 5-8 of the Act authorizing a change of guardian or custodian provides no standards to guide the court in making this decision and the implied standard of what is in the best interest of the child allows the trial court broad discretion in awarding custody or guardianship and this discretion is rarely disturbed upon review.[5] However, even if it is conceded that there was a practical possibility the juvenile court would appoint Peter Stanley guardian or custodian of his children, such a concession does not change the posture of this case for the rights accorded a court appointed guardian or custodian are simply not similar to those of a parent.

As a court appointed guardian or custodian, Peter Stanley would be under the constant supervision of the juvenile court and would be, whenever requested, required to make reports concerning his doings with respect to the children, § 5-8. Furthermore, he could be removed as guardian or custodian whenever the trial court wished to do so, § 5-8. He would, of course, not be free to move his children outside the court's jurisdiction without prior approval. The State recognizes, explicitly and implicitly, the distinct difference between being a parent and a custodian or guardian.

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[5]We have been able to find few Illinois cases in which neither party seeking custody of a child falls into the category of a "legal parent." In those cases where neither party seeking custody is a "parent," the appellate courts have always affirmed the decision of the trial court. *In re Richards*, 328 Ill. App. 591, 66 N.E. 2d 512 (1st Dist., 1946); *Winslow v. Lewis*, 15 Ill. App. 2d 65, 144 N.E. 2d 782 (2nd Dist., 1957); *Petition of Kollman*, 10 Ill. App. 2d 336, 134 N.E. 2d 629 (1st Dist., 1956); *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 33 N.E. 2d 467 (1941).

Explicit recognition of the distinction between a parent and a custodian or guardian is apparent from the Juvenile Court Act itself which provides that even upon the appointment of a guardian or custodian, there remain residual parental rights, such as the right to visitation and to determine religious affiliation, § 1-16. The State implicitly recognizes there is a difference between being a parent and a guardian or custodian when it argues (Brief For Appellee In Supreme Court of Illinois, pp. 16-17) that the classification of parents which excludes unwed fathers encourages adoption. The adoptive parent is defined as a parent under the Juvenile Court Act, § 1-14. However, if an unwed father could obtain the benefits of being classed as a parent simply by being appointed guardian or custodian, there would be no reason for him to incur the added expense and effort of an adoption proceeding. If, having been appointed custodian or guardian, there is no reason to seek adoption, then it is impossible to argue the statutory classification in question encourages adoption. The State, in arguing that the classification does, in fact, encourage adoption, thus, recognizes that there is a difference between being a parent and a mere guardian or custodian.

The simple but fundamental difference between being a parent and being a mere custodian or guardian is that a parent has the right to raise his children free from governmental intrusion save in a limited number of circumstances. This Court has recognized the importance to and right of a parent to raise his children free from unwarranted government influence: "The child is not the mere creature of the state; those who nuture him and direct his destiny have *the right*, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (Emphasis added); *Meyer v. Nebraska*, 262 U.S. 390 (1923). A court appointed guardian or custodian is not only not free from governmental intrusion upon the rearing of the minor, but, indeed, holds his position by virtue of that intrusion. The only way

Peter Stanley could regain the freedom from governmental intrusion in his familial relationship with his children which he enjoyed prior to Joan Stanley's death, and which all other natural parents enjoy, was to adopt his children, thereby obtaining the status of a legal parent.

Although, adoption is and was theoretically open to Peter Stanley, it is and was even more unavailable as a practical matter than the obtaining of appointment as guardian or custodian. The impossibility of adoption is best illustrated by the fact that although the trial court, prosecutor, probation officer, and Peter Stanley's counsel in the court below all had suggestions about how Peter Stanley might regain the custody and control of his children, none of these persons, knowledgeable in the workings of the juvenile court, even suggested or even hinted that adoption was a possibility. An adoption proceeding is by no means a simple legal proceeding as is shown by any practice manual, e.g. Ill. Inst. for Continuing Legal Education, *Illinois Family Law II—Legal Problems of the Illinois Family*, Chap. 9 (1969). Moreover, since Peter Stanley's children were wards of the juvenile court, before an adoption could take place the permission of that court would be required, § 5-9. Since adoption would free Peter Stanley from the control of the juvenile court, all those factors which would inhibit his appointment as custodian or guardian by that court would operate even more forcefully to prevent Peter Stanley from receiving juvenile court approval to adopt his children. It is quite probable that before the juvenile court would permit Stanley to adopt his children, it would have appointed him as custodian and then observed his "performance" through the watchful eye of the probation officer who originally filed the unfounded neglect petitions against him. Peter Stanley would also undoubtedly be subject to an intensive investigation by the adoption court to determine his fitness to be an adoptive parent, *Ill. Rev. Stat.*, Ch. 4, § 9.1-6 (1969). Ironically, the independent investigation by the adoption court would not be mandatory because the adoption act, recognizing that biological rela-

tionships are important, provides that when the person seeking to adopt is related by blood or marriage to the child, an investigation of the prospective adoptive parent is a matter of discretion, *Ill. Rev. Stat.*, Ch. 4, § 9.1-6 (1969). However, it is difficult to believe that the adoption court judge would not order an investigation of Peter Stanley. Thus, whatever might be or have been Peter Stanley's chances of being appointed custodian or guardian, his chances for adoption were even less. However, even were it further conceded that there was a practical possibility that Peter Stanley could have adopted his children, the legal posture of this case is still not changed.

The record in the proceedings below demonstrates the frustrating position in which Peter Stanley was placed. Although he had acknowledged, supported, established a familial relationship with and neither neglected nor abused his children, when his common-law wife died he was converted from a loving father into a disadvantaged stranger to his children. Despite a suggestion that the future held a possibility that he might be appointed custodian or guardian by the juvenile court, Peter Stanley recognized that Illinois law and his personal circumstances made that possibility a theoretical and practical impossibility. These same factors rendered the theoretical possibility of adoption a similar impossibility. Moreover, since the Juvenile Court Act specifically provides only for an appeal of the adjudication of wardship, § 4-8 (3), Peter Stanley took the only avenue open to him and appealed the decision of the juvenile court adjudicating his children dependent and wards of the juvenile court. However, Peter Stanley's appeal from the adjudication of dependency and wardship places this case in the precise posture necessary for principled constitutional decision making under the Equal Protection Clause. The issue here is not whether Peter Stanley could or should be appointed guardian or custodian nor whether he could or should adopt his children. The issue here is whether the State of Illinois, simply because of Peter Stanley's sex, lack of a marriage certificate and untimely loss of his common-

law wife, can deny Peter Stanley the protection of the laws it affords all other natural parents even those who fail to acknowledge, support and establish a familial relationship with their legitimate and illegitimate children.

A. *The interest of an unwed father in continuing, after his common law wife's death, to be able to rear his children free from unwarranted governmental interference is fundamental and there is no compelling justification for nor necessity of the State interfering with this fundamental interest by the drastic means of declaring every unwed father a legal stranger to his child.*

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those that are disadvantaged by the classification." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). In considering the facts and circumstances behind the law along with the interest the state claims to be protecting—the purpose of the statute—and the interest of those disadvantaged by the classification, this Court has recognized that when certain interests are disadvantaged the relationship between the statutory purpose and the discriminatory classification requires strict scrutiny. Such interests as freedom from discrimination based upon race, *McLaughlin v. Florida*, 379 U.S. 184 (1964), freedom from monetary discriminations for those involved in the criminal process, *Rinaldi v. Yeager*, 384 U.S. 305 (1966), freedom from discrimination based upon the fact of illegitimate birth, *Levy v. Louisiana*, 391 U.S. 68 (1968), or freedom from discrimination interfering with the exercise of constitutional rights or fundamental liberties, *Shapiro v. Thompson*, 394 U.S. 618, (1969), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), require not only a statutory purpose reflecting the promotion of ". . . a compelling governmental interest . . .," *Shapiro v. Thompson, supra* at 634, but also require that the relationship between the statutory purpose and the discriminatory classification be ". . . carefully and meti-

culously scrutinized . . ." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Other less significant interests such as freedom from discriminatory economic regulations, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Goeseart v. Cleary*, 335 U.S. 464 (1948), or the opportunity to cast an absentee ballot, *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), are subjected to a less rigid scrutiny and only a rational relationship between the discriminatory classification and any reasonably conceived permissible statutory purpose is required.

The interest of Peter Stanley disadvantaged, indeed, destroyed by the Illinois classification of "parents" challenged here is the right to be free from governmental intrusion upon and interference with the rearing of his children except under the same circumstances such intrusion and interference is allowed in the rearing of children by any other natural parents. Peter Stanley's interest in maintaining a familial relationship with his children like that accorded other surviving natural parents is an interest of a different tenor than the interest of a woman in being a barmaid, *Goeseart v. Cleary, supra*, the interest of a jailed accused in casting an absentee ballot, *McDonald v. Board of Election Commissioners, supra*, or the interest of a corporation in drilling into a rock to obtain mineral water, *Lindsley v. Natural Carbonic Gas Co., supra*.

A biological coupled with a familial relationship engenders a sanctimonious relationship deservant of this Court's special recognition. Indeed, ". . . biological relationship is the test that has been used—since time immorial—in our and other cultures for the fixing of support and other familial obligations, and it is the biological relationship that underlies and is traced by legal relationship." Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana-First Decisions on Equal Protection and Paternity*, 36 U. Chi. L. Rev. 338, 345 (1969). The State of Illinois recognizes that the biological relationship alone is significant in the question of fitness to be a parent in its Adoption Act. The

Adoption Act provides that where the prospective adoptive parent is related by blood to the child to be adopted, an investigation as to adoptive parent's fitness is not mandatory, Ill. Rev. Stat., Ch. 4, § 9.1-6 (1969). However, where the prospective adoptive parent is not related by blood or marriage an investigation as to the prospective adoptive parent's fitness is mandatory. *(Id.)* This Court has recognized that the mere right to create a biological relationship is a fundamental one. *Skinner v. Oklahoma,* 316 U.S. 535 (1942). One who has exercised this fundamental right and then voluntarily acknowledged supported and established a familial relationship with his offspring, must enjoy an equally fundamental interest in maintaining that relationship free from unwarranted governmental interference. In *Glona v. American Guarantee and Liability Insurance Co.,* 391 U.S. 73 (1968) this Court recognized that biological and familial lines are significant and cannot be disregarded at the whim of the legislature. Moreover, we deal here with more than the mere interest of one person in the death of another; on the contrary, we deal with a father's interest in the life of his children and his maintenance of a familial relationship with them.

Although it has often been said that the common law gave the unwed father no right to custody of his illegitimate child, the attached historical appendix indicates that an unwed father's familial relationship with his illegitimate children, where consented to by the mother, would not be disturbed at common law. Interestingly, as late as 1949, even the State of Illinois recognized an unwed father's right to the custody and control of his children (Appendix II, *infra*) and even under the present statutes it was only the death of Peter Stanley's common law wife that allowed the State to interfere with this relationship.

More than Peter Stanley's biological relationship with his children is involved in this case. Practically all males can, in a biological sense, father children; but not all, within or without wedlock, can or are willing to assume the cultural

role of a father in a family relationship. Schneider, American Kinship—A Cultural Account, 42 (1968). Peter Stanley was not merely the biological progenitor of Kimberly and Peter, Jr. but was, indeed, their cultural father and their only natural parent. The fact Peter Stanley was a voluntarily acknowledging and supporting father who had created and maintained a family is not changed by the mere presence or absence of a marriage certificate:

> "A man and a woman may live together outside the legal tie of marriage for a variety of realistic reasons, the most common being an undissolved marriage on the part of one or both. In many such situations the couple establishes a home and raises a family of children. Except for the legal factor, this may be a family like any other. Psychologically, the parents are not an unmarried mother and an unmarried father, and they do not show the same personality problems or act out the same behavior. The very fact that they are parents in the social and emotional as well as the biological sense distinguishes them immediately from the unmarried mother and the unmarried father who establish no real or lasting relationship with each other." Young, *Out of Wedlock*, 147 (1954).

Peter Stanley's interest in being recognized as the good parent he is, in being treated similarly to other natural parents and, thereby, in being freed from governmental intrusion upon his rearing of his children is a fundamental interest with which the State cannot tamper without very good reason.

> "(S)tatutes regulating sensitive areas of liberty do, under the cases of this Court, require 'strict scrutiny' . . ., and must be viewed in the light of less drastic means for achieving the same basic purpose . . .'. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'"

Griswold v. Connecticut, 381 U.S. 479, 503-504 (White J., concurring–Citations Omitted) (1965). The only purposes put forward by the State as justifying the classifying of Peter Stanley as a stranger to his children are that the classification makes administration of the Adoption Act more convenient and the classification serves the best interests of minors by locating good parents. (See *infra*, pp. 25-30) However, administrative convenience is never a sufficiently compelling interest to justify encroachment upon a fundamental interest. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1968). Moreover, the State of Illinois can certainly ferret out good and bad parents by means less drastic than the blanket categorization of *all* unwed fathers as bad parents. Indeed, the Juvenile Court Act itself provides the means for locating such parents through the neglect proceedings previously described. The failure of the State to show a compelling governmental interest for its classification and the recognition that there are less drastic means for accomplishing any legitimate interests the State may claim renders the classification under review violative of the Equal Protection Clause. The adjudication of Peter Stanley's children as dependent and wards of the Juvenile Court, by application of this classification, must be reversed.

B. *The Juvenile Court Act's classification of unwed fathers as non-parents is violative of the Equal Protection Clause for it is not rationally related to any reasonably conceived, legitimate state interest.*

According to Justice Holmes classic formulation of equal protection clause analyses, ". . . the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far as so fast as it means allow." *Buck v. Bell*, 274 U.S. 200, 208 (1927). Similarly, in *F. S. Royster Guano v. Virginia*, 253 U.S. 412 (1920), this Court stated that, ". . . the classification must be reasonable, not arbitrary, and it must rest upon some ground

of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Id.* at 14) In applying this traditional standard to ascertain whether a statutory classification has unconstitutionally failed to include all those it should have included, we must examine whether the discriminatory classification bears any rational relationship to a legitimate state purpose. Traditional analysis allows the State considerable latitude in erecting purposes which might justify the discriminatory classification. The only limitation upon the ingenuity of the State's inventiveness is that the asserted statutory purpose must be reasonably conceived and the purpose claimed cannot be constitutionally inpermissible. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-80 (1911); *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 808-809 (1969).

Since the Illinois Juvenile Court Act sets forth an explicit statement of its purposes and since the opinion below and the State both in the Illinois Supreme Court (Brief for Appellee in Illinois Supreme Court, pp. 15-17) and in this Court (Brief For Respondent In Opposition, pp. 8-11) relied solely upon the purposes set forth in the Juvenile Court Act to justify the statutory classification, the Petitioner would ordinarily hesitate to suggest any other purposes could be reasonably conceived as justifying the discriminatory treatment of unwed fathers. However, because the legislative history reveals clearly that the purpose of the Illinois discriminatory treatment of unwed fathers was to promote the efficient administration of Illinois adoption proceedings, the Petitioner will also treat this one other conceivable purpose justifying the discriminatory classification of unwed fathers of illegitimate children.

1. **The Purpose of the Classification of Unwed Fathers As Non-Parents Was Not to Serve the Best Interests of Children and the Classification Is Not Rationally Related to that Asserted Purpose.**

The Juvenile Court Act states as its purpose:

> "The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents when his welfare of safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise." § 1-2.

This laudatory statement would seem to prescribe that the State of Illinois would do all possible not only to maintain but to promote and encourage Peter Stanley's previously established familial relationship with his children. However, concentrating solely on the guideline of protecting the safety and welfare and promoting the best interests of minor children, Illinois has determined that upon the death of the mother of illegitimate children it should, under all circumstances, terminate the previously established and maintained filial relationship of the unwed father with his children. The State then allows the unwed father the possibility of partially reasserting the familial relationship by being appointed custodian or guardian by the juvenile court and allows him fully to reassert this previous relationship with the children only under the even more tenuous possibility that he could adopt his children.

There is no inherent relationship, let alone a rational one, between promoting the best interests of children and the classification of unwed fathers as strangers to their illegitimate children. In its search for ways in which the classification of unwed fathers as non-parents promotes the best interests of children, the State first suggested that the classification does this by encouraging adoption. In the Illinois Supreme Court the State argued that the "first and most important reason" for the discriminatory treatment was that it encourages adoption, and adoption has the benefit of allowing the adopted child to take intestate from the unwed father. The State also suggested that adoption is beneficial as it removes "the stigma of illegitimacy."

Both arguments are misplaced for Illinois' treatment of unwed fathers discourages them from seeking adoption and it is evident that no legislator could have been seeking either end by the classification of unwed fathers as non-parents.

Since Illinois treats the unwed father as a stranger to his children, it would be extremely unwise for him to petition for adoption of his children. The unwed father would recognize that by so petitioning he would alert State officials to the fact he was not married to the children's mother. If, as in Peter Stanley's case, the children's mother is deceased and the father is not wealthy he will recognize that the alerting of these officials will cause a Dependency Petition to be filed in the juvenile court which undoubtedly will result in his children being removed from his custody and control. Moreover, the unwed father will recognize that the investigation of his parental suitability will alert friends and neighbors to the fact he and his common-law wife were and are not married. Indeed, this investigation will create and far spread the "stigma of illegitimacy" by alerting friends and neighbors to the out of wedlock birth of his children about which they may not have known. The unwed father would also be discouraged by the cost of obtaining legal assistance and the cost of the adoption proceedings themselves, *cf. Boddie v. Connecticut*, 38 U.S. Law

the State does not interfere in the father's relationship with his children except under the same circumstances it would interfere with the child rearing by parents of legitimate children. Finally, the statute does not attempt to ferret out neglectful or abusive parents for as the record below shows no evidence as to neglect was introduced and, indeed, Peter Stanley's placement of his children with his trusted friends was confirmed as a wise act by the trial court's appointment of the Ness' as guardians.

It should be apparent that attributing this narrow purpose to the statutory classification involves nothing more than inquiring into the effect of the classification, labeling the observed effect as the statute's purpose and asserting that, since the purpose is related to the classification the classification is not violative of the equal protection clause. Despite such phrasing of the classification's purpose in terms of its effect, analysis of the actual operational effect of the statute demonstrates that the purpose of the classification was simply not to locate suitable and unsuitable persons to assume parental control.

In its Brief In Opposition filed in this Court the State asserts, "The record in this case is totally devoid of relevant facts concerning Stanley's suitability for custody of minor children other than his prolonged relationship with the mother and familiarity with the children." (Respondents Brief in Opposition, p. 10, n. 7) Although an inaccurate categorization of the record, (see, *supra*, pp 5, 11) if, in fact, the record was "devoid of relevant facts concerning Stanley's suitability for custody" how can it be conceived that the purpose of the classification was in fact to locate suitable and unsuitable parents. Indeed, the State seemingly concedes this is not the classification's purpose for it says, "Whether Petitioner Stanley is a proper guardian for minor children . . . is irrelevant to the Equal Protection analysis." (Respondents Brief In Opposition, p. 11, n. 7) If the very purpose of the classification is to locate good and bad parents for minor children after their mother's death, the issue

of whether the [illegible]er is a proper parent cannot be irrelevant to analysis of the statute's validity under the Equal Protection Clause. However, even were we to assume that the purpose of the classification was to search out and provide only suitable unwed fathers as parents for motherless illegitimate children, the purpose is unrelated to the classification because two necessary presumptions which underlie the relationship are unfounded.

Since the purpose of classifying unwed fathers as non-parents is, assertedly, to allow only "suitable," not merely non-neglectful, unwed fathers to assume parental control, we must presume that as a general matter removing children from the custody and control of unwed fathers, at least until the fathers can demonstrate their suitability for parenthood, is not adverse to the children's best interests. We must also presume that the juvenile court facilities are capable of and are able to find replacements for the children at least as good as that provided by the unwed father. Neither presumption is warranted.

"Psychologists caution against severing the child from his father and mother images, one formed or reformed, and courts today, accept by judicial notice that this is detrimental to the child." Comment, 1968 U. Ill. L. Forum 232, 233 (1968).[6] The abrupt severing of family ties and filial relationships has been described for the child as an experience ". . . pregnant with pain and terror for him and potentially damaging to his personality and normal growth." Young, *Placement From The Child's Viewpoint*, 31 Social Casework 250-251 (1950). This experience must be even more frightening and detrimental when it has been preceded by the untimely death of the child's mother. Adoption agencies accept as a *sine qua non* of their work the principle

[6]See generally, Spitz, The First Year of Life (1965); A. Freud & Burlingham, War & Children (1944); Anthony & Benedek, (eds.) Parenthood, Ch. 27 (1970).

that a child should be placed with a family as early as possible after birth and this relationship should not be disturbed. Indeed, the latter principle has been urged as justifying Statutes, e.g. Ill. Rev. Stat., Ch. 4, § 9.1-8(e) (1969), that provide the putative father of an illegitimate child need not be notified of a pending adoption proceeding, e.g., *Father of an Illegitimate Child–His Right to be Heard,* 50 Minn. L. Rev. 1071 (1966). Moreover, "(w)eak parents need help. They do not need the final failure and degradation of filial deprivation. The child needs his own place in a real home–however underprivileged." Dobson, *The Juvenile Court And Parental Rights,* 4 Family L. Q. 393, 408 (1970). Illinois has recognized both of these principles by providing that before a child may be taken from a legal parent, it must not only be shown by a preponderance of the evidence that the child has been neglected but it also must be shown that it is in the best interest of the child that he be declared a ward of the juvenile court and it must further be shown that the parent is unable and unfit for reasons other than financial circumstances alone to properly care for the child. Furthermore, even upon a conviction for the criminal offense of contributing to the dependency or neglect of a minor, the legislature has made special provision for keeping the child with the erring parent. Ill. Rev. Stat., Ch. 23, § 2361 (1969). Terminating the unwed father's familial relationship with his children without any indication as to whether or not he is or was a good parent and then making it extremely difficult, if not impossible, for him to resume the familial relationship can only disserve the best interests of children.

The second presumption that must be made in order to support the proposition that the State is acting in the best interest of the child in not affording the unwed father any rights to parental control of his children is that the State, in its role as *parens patriae,* is able to make good placements of children who have been taken from their natural parent's custody and control. This Court recognized in *In*

Re Gault, 387 U.S. 1, 27 (1967) that despite good intentions the states were unable to perform the role of the kindly and humane *parens patriae* with respect to delinquent children. Unfortunately, the situation is no better respecting dependent and neglected children. The term *parens patriae* as applied to dependent children in the State of Illinois in almost all cases means for the child a series of foster homes. In Illinois dependent children are usually under the guardianship of the Illinois State Department of Children and Family Services. It is not uncommon for a dependent child to be in 8 or 10 foster homes and have an equal number of caseworkers before he reaches majority. Moreover the agencies who are guardians of dependent children are often inadvertently inhuman due to bureaucracy, inefficiency and depersonalization. See e.g. *Murphy NLADA Juvenile Court Project*, 27 Legal Aid Briefcase 223 (June 1969). A periodical published by the Illinois Department of Children and Family Services entitled Perspective recently painted the following bleak picture:

> "(T)he deck is stacked against the dependent child in Cook County. In a city groaning under a massive, shifting population which contributes to the family breakdown, Chicago suffers from an acute shortage of shelter care facilities for abandoned and neglected children, lack of trained child welfare workers, and not enough money to remedy the problem." 5 Perspective 4, 5 (March 1969).

The 1970 Report of the Illinois White House Conference on Children and Youth confirmed the latter:

> "The dearth of foster homes and diversified institutional facilities, means that decisions about where to place are generally based upon availability rather than suitability; that children are being deprived of foster care because of the accident of geography, color, or the circumstances that dictate the need; and that foster parents or institutions are being asked to take children, both in kind and number, which extend their limits beyond the point where

> they can function effectively. Further, foster families usually lack community status, reimbursement, training, and professional counsel. Natural families often do not get the help they need to reconstruct their families, to release their children for adoption, or to be positively involved in the life of their children who grow up in foster care. Report Of Illinois White House Conference On Children and Youth, 62 (May, 1970).

It is, thus, clear that the State of Illinois classification of unwed fathers as non-parents which results in severing his parental control of the children with only the smallest likelihood that he can regain the control not only fails to serve the best interest of the children but is actually detrimental to them. Furthermore, the assumption that Illinois in its *parens patriae* function can perform better than even mediocre unwed fathers is simply unfounded and it cannot be asserted that it is in the best interest of children in general to allow the State to perform that function upon these children.

2. Classification of Unwed Fathers as Non-Parents Actually Disserves the Purpose of Better Administering the Adoption Act.

An examination of the facts and circumstances behind the Illinois classification rendering the unwed father a stranger to his children indicates that the purpose of the classification was to speed and finalize Illinois adoption proceedings. As the attached historical appendix (*infra*, pp. 51-65) details more fully, from 1827 until 1872 the putative father of an illegitimate child in Illinois had the right to demand control and charge of the illegitimate child from the mother and if she failed to give the child over to the father, the father was released from any duty of support. From 1872 until 1949 the Illinois Bastardy Act provided that the right to elect to assume control and charge of the child did not occur until the child was 10 years of age. In

1946 the Illinois Attorney General was requested to issue an opinion as to whether the natural father of an illegitimate child should be named in a petition for the child's adoption. On 18 December 1946 the Illinois Attorney General answered this question in the affirmative. 1946 Op. Ill. Att'y. Gen. 58. The opinion noted that the Illinois appellate courts had not specifically decided the question of whether the putative father must be named in an adoption petition. However, the Illinois Attorney General believed that whenever the putative father had been adjudicated the parent under the Bastardy Act he had to be named in the adoption proceeding. Moreover, the Attorney General found that in those situations where paternity had not been adjudicated, the adoption court judge had to appoint a guardian with the right to consent to adoption in order to assure the adoption proceedings properly terminated a putative father's potential right to custody. Less than three years later the Illinois General Assembly amended the Bastardy Act to provide "The reputed father of a bastard child shall have no right to the custody or control of such child." Ill. Rev. Stat., Ch. 17, § 13 (1949). This prohibition of the putative father obtaining custody and control of his children is now contained in Section 62 of the Illinois Paternity Act, *Ill. Rev. Stat.*, Ch. 106-3/4, § 62 (1969). "As was pointed out in 46 Ill. L. Rev. 156 (1951), 'Rights of a Father Toward His Illegitimate Child in Illinois' Sec. 62 was originally enacted to avoid conflicts with the adoption Act then in force . . . ." *Wallace v. Wallace*, 60 Ill. App.2d 300, 210 N.E. 2d 4, 5 (1st Dist. 1965). The author of the law review article cited by the Illinois Appellate Court demonstrates clearly that the purpose of the revision of the Bastardy Act was not so much to alter the status of the putative father as to conform the Bastardy to the Adoption Act. The meager historical materials available concerning enactment of the present Juvenile Court Act in 1965, Trumbull, *Proposed New Juvenile Court Act For Illinois*, 53 Ill. Bar. J. 608 (1965), indicate no reason for the classification of unwed fathers as non-parents other than the

obvious one of conforming the Juvenile Court Act definition of parents to the definitions prevailing under the adoption and paternity laws. Thus, the reason for the discriminatory treatment of unwed fathers found in the Juvenile Court Act was merely in order to serve the administrative convenience of adoption proceedings.

Unlike the other purposes set forth as justifying the treatment of the unwed father as a non-parent, convenience in the administering of the Adoption Act may reasonably be conceived as the original purpose of the classification. There is, however, no rational relationship between speeding up and finalizing adoption proceedings and treating the unwed father as a stranger to his children under the Juvenile Court Act. Indeed, administrative convenience in adoption proceedings is disserved by the discriminatory treatment under the Juvenile Court Act.

If one assumes that the discriminatory treatment of unwed fathers encourages them to file adoption petitions for the purpose of obtaining the parental status the State has taken from them, the result merely would be to clog the adoption courts. Moreover, since the primary purpose of adoption acts is to find homes for children who have no home or family willing to care for them, to clog the adoption courts with natural parents desirous of maintaining an established filial relationship with their children is to impose a burden without any significant benefit for the juvenile court can, supposedly, find "suitable" parents and is entrusted with that function in the first instance. Furthermore, it is difficult to see how one would keep an unwed father, like Peter Stanley, who has acknowledged, supported and maintained a familial relationship with his children away from the adoption proceeding simply by not formally notifying him. Certainly, this Court can not presume the State has as its purpose increasing the supply of adoptable children by perfunctorily removing them from the control of unwed fathers who express an interest and desire in retaining parental control over their children.

Aside from the fact that it is by no means clear that there would be any detrimental effect upon adoption proceedings were putative fathers to be notified of pending adoption proceedings, Comment, 1968 U. Ill. L. Forum 232 (1968), and aside from the fact involving putative fathers in the adoption process is increasingly being recognized as in the best interest of the child and the father,[7] the injection of the adoption proceeding effects argument into this case is spurious. We deal here with a readily identifiable class of unwed fathers, those who have acknowledged, supported, established a familial relationship with and not neglected or abused their children and who are desirous of maintaining that relationship after the children's mother's death. Adoption proceedings are and should only be concerned with a readily non-identifiable class of unwed fathers whose lack of identity indicates they have no interest or desire in providing a family and home for their children.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

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[7] Burgess, *The Unmarried Father In Adoption Planning*, 15 Children 71 (March-April 68); U.S. Children's Bureau, Dept. Health, Education & Welfare, The Unmarried Father–Demonstration and Evaluation of an Assertive Casework Approach (1967); Child Welfare League of America, Standards For Adoption Services (1958); Anglim, *The Adopted Child's Heritage–Two Natural Parents*, 44 Child Welfare 339 (1965).

APPENDIX I

APPENDIX I

RELEVANT SECTIONS OF ILLINOIS JUVENILE COURT ACT

Juvenile Court Act, § 1-2; Ill. Rev. Stat., Ch. 37, § 701-2 (1969).

> Purpose and Policy.) (1) The purpose of this Act is to secure for each minor subject hereto such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should be given by his parents, and in cases where it should and can properly be done to place the minor in a family home so that he may become a member of the family by legal adoption or otherwise.

Juvenile Court Act, § 1-4; Ill. Rev. Stat., Ch. 37, § 701-4 (1969).

> Adjudicatory hearing.) "Adjudicatory hearing" means a hearing to determine (a) whether the allegations of a petition under Section 4-1 that a minor is otherwise in need of supervision, neglected or dependent are supported by a preponderance of the evidence or whether the allegations of a petition under Section 4-1 that a minor is delinquent are proved beyond a reasonable doubt, and (b) whether a minor should be adjudged to be a ward of the court.

Juvenile Court Act, § 1-10; Ill. Rev. Stat., Ch. 37, § 701-10 (1969).

"Dispositional hearing" means a hearing to determine what order of disposition should be made in respect of a minor adjudged to be a ward of the court.

Juvenile Court Act, § 1-11; Ill. Rev. Stat., Ch. 37, § 701-11 (1969).

"Guardianship of the person" of a minor means the duty and authority, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his general welfare. It includes but is not necessarily limited to (a) the authority to consent to marriage, to enlistment in the armed forces of the United States, or to a major medical, psychiatric, and surgical treatment; to represent the minor in legal actions; and to make other decisions of substantial legal significance concerning the minor;

(b) the authority and duty of reasonable visitation, except to the extent that these have been limited by court order; (c) the rights and responsibilities of legal custody except where legal custody has been vested in another person or agency; and (d) the power to consent to the adoption of the minor, but only if expressly conferred on the guardian in accordance with Section 5-9.

Juvenile Court Act, § 1-12; Ill. Rev. Stat., Ch. 37, § 701-12 (1969).

"Legal custody" means the relationship created by an order of court which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, except as these are limited by residual parental rights and responsibilities and the rights and responsibilities of the guardian of the person, if any.

Juvenile Court Act, § 1-14; Ill. Rev. Stat., Ch. 37, § 701-14 (1969).

Juvenile Court Act, § 4-1 (1), (2); Ill. Rev. Stat., Ch. 37 § 704-1 (1), (2) (1969).

> Petition; Supplemental Petitions.) (1) Any adult person, any agency or association by its representative may file, or the court on its own motion may direct the filing through the State's Attorney of a petition in respect of a minor under this Act. The petition and all subsequent court documents shall be entitled 'In the interest of . . ., a minor.' (2) The petition shall be verified but the statements may be made upon information and belief. It shall allege that the minor is delinquent, otherwise in need of supervision, neglected or dependent, as the case may be, and set forth (a) facts sufficient to bring the minor under Section 2-1; (b) the name, age and residence of the minor; (c) the names and residences of his parents; (d) the name and residence of his legal guardian or the person or persons having custody or control of the minor, or of the nearest known relative if no parent or guardian can be found; and (e) if the minor upon whose behalf the petition is brought is detained in custody, the date on which detention was ordered by the court or the date set for a detention hearing. If any of the facts herein required are not known by the petitioner, the petition shall so state.

Juvenile Court Act, § 4-6; Ill. Rev. Stat., Ch. 37, § 704-6 (1969)

> Evidence at Adjudicatory Hearing.) At the adjudicatory hearing, the court shall first consider only the question whether the minor is a person described in Section 2-1. The standard of proof and the rules of evidence in the nature of criminal proceedings in this State are applicable to Section 2-2. The standard of proof and the rules of evidence in the nature of civil proceedings in the State are applicable to Sections 2-3, 2-4, and 2-5.

Juvenile Court Act, § 4-8; Ill. Rev. Stat., Ch. 37, § 704-8 (1969).

Findings and Adjudication.) (1) After hearing the evidence the court shall make and note in the minutes of proceedings a finding of whether or not the minor is a person described in Section 2-1. If it finds that the minor is not such a person or that the best interests of the minor and the public will not be served by adjudging him a ward of the court, the court shall order the petition dismissed and the minor discharged from any detention or restriction previously ordered in such proceeding.

(2) If the court finds that the minor is a person described in Section 2-1 and that it is in the best interest of the minor and the public that he be made a ward of the court, the court shall note in its findings whether he is delinquent, otherwise in need of supervision, neglected or dependent, specifying which of Sections 2-2 through 2-5 is applicable, and shall adjudge him a ward of the court and proceed at an appropriate time to a dispositional hearing.

(3) An adjudication of wardship hereunder is a final judgment for purposes of appeal. The appellee shall be the People.

Juvenile Court Act, § 5-1 (1); Ill. Rev. Stat., Ch. 37, § 705-1 (1) (1969).

Dispositional Hearing; Evidence Continuance.) (1) After adjudging the minor a ward of the court, the court shall hear evidence on the question of the proper disposition best serving the interests of the minor and the public. All evidence helpful in determining this question, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purpose of the adjudicatory hearing.

Juvenile Court Act, § 5-2 (1), (d), (3); Ill. Rev. Stat., Ch. 37, § 705-2 (1), (d), (3) (1969).

Kinds of Dispositional Orders.) (1) The following kinds of orders of disposition may be made in

respect of wards of the court: (d) A minor under 18 years of age found to be dependent under Section 2-5 may be placed in accordance with Section 5-7. (3) Unless the order of disposition expressly so provides, it does not operate to close proceedings on the pending petition, but is subject to modification until final closing and discharge of the proceedings under Section 5-11.

Juvenile Court Act, § 5-7 (1), (a), (f), (2); Ill. Rev. Stat., Ch. 37, § 705-7 (1), (a), (f), (2) (1969).

Placement; Legal Custody or Guardianship.) (1) If the court finds that the parents, guardian or legal custodian of a minor adjudged a ward of the court are unfit or are unable, for some reason other than financial circumstances alone to care for, protect, train or discipline the minor or are unwilling to do so, and that it is in the best interest of the minor to take him from the custody of his parents, guardian or custodian the court may (a) place him in the custody of a suitable relative or other person; (f) in the case of a neglected or dependent minor under 18 years of age adjudged a ward of the court under Section 2-4 or 2-5, commit him to the Department of Children and Family Services for care and service. The Department shall be given due notice of the pendency of such action and the Guardianship Administrator of the Department shall be appointed guardian of the person of such minor. Whenever the Department discharges a minor from its care and service, the Guardianship Administrator of the Department shall petition the court for an order terminating guardianship.

(2) When making such placement, the court, whenever possible, shall select a person holding the same religious belief as that of the minor or a private agency controlled by persons of like religious faith of the minor. In addition, whenever alternative plans for placement are available, the court shall ascertain and consider, to the extent appropriate in the particular case, the views and preferences of the minor.

Juvenile Court Act, § 5-8; Ill. Rev. Stat., Ch. 37, § 705-8 (1969).

> Reports of Custodian or Guardian; Change of Custody.) (1) The court may require any legal custodian or guardian of the person appointed under this Act to report periodically to the court or may cite him into court and require him or his agency, to make a full and accurate report of his or its doings in behalf of the minor. The custodian or guardian, within 10 days after such citation, shall make the report, either in writing verified by affidavit or orally under oath in open court, or otherwise as the court directs. Upon the hearing of the report the court may remove the custodian or guardian and appoint another in his stead or restore the minor to the custody of his parents or former guardian or custodian. (2) The minor or any person interested in the minor may apply to the court for a change in custody of the minor and the appointment of a new custodian or guardian of the person or for the restoration of the minor to the custody of his parents or former guardian or custodian. No legal custodian or guardian of the person may be removed without his consent until given notice and an opportunity to be heard by the court.

Juvenile Court Act, § 5-9 (1); Ill. Rev. Stat., Ch. 37, § 705-9 (1) (1969).

> Adoption; Appointment of Guardian With Power to Consent.) (1) A ward of the court under this Act, with the consent of the court, may be the subject of a petition for adoption under "An Act in relation to the adoption of persons, and to repeal an Act therein named," approved July 17, 1959, as heretofore or hereafter amended, or with like consent his parent or parents may, in the manner required by such Act, surrender him for adoption to an agency legally authorized or licensed to place children for adoption.

APPENDIX II

INDEX TO APPENDIX II

Page

Cases:

Chamber v. Chamber, 33 Selden Society Year Books, 5 Edw. II, at 161 (1312); 36 Selden Society Year Books, 7 Edw. II, at 95 (1313) 57

Queen v. Nash, 10 Q.B. 454 (1883) 61

Rex v. Hopkins, 7 East 579 (1806) 61

Rex v. Moseley, 5 East 224 note 61

Rex v. Soper, 5 Term. R. 278 (1793) 61

Wright v. Bennett, 7 Ill. 587 (1845) 63

Statutes:

Nov. 89 (539 A.D.) 52

20 Hen. III, The Provisions of Merton (1235-36) 55

18 Eliz. I, ch. 3 (1575-76) 57, 58

Hening, Va. Stat. 1727, ch. 7, at 212 61

49 Geo. III, ch. 68 (1809) 58

An Act to provide for the maintenance of Illegitimate Children, 1827, in Ill. Stat. Laws 1839, at 332 . . . . . 62, 63

Ill. Laws 1871-72, at 423 63

Ill. Laws 1899, at 131 64

Ill. Rev. Stat. ch. 17, sec. 13 (1945) 64

Ill. Laws 1945, at 10 64

Ill. Laws 1949, at 344 . . . . . 64, 65

La. Civ. Code. Ann., Art. 202, 200, 290 (West 1952) 53

Ill. Rev. Stat., ch. 37, sec. 701-11 (1969) 60

Other Authorities:

N. Adams, Nullius Filius, 6 U. of Tor. L.J. 361 (1946) 57

W. Blackstone, Commentaries on the Laws of England (Cooley ed., 1879) 53, 59, 60

F. Blume, Legitimation under Civil Law, 5 Tul. L.R. 256 (1931) 51, 52

S. Breckinridge, The Family and the State (1932) 62

J. Kent, Commentaries on American Law (2d ed., 1832) 62

N. Neilson, 47 Selden Society Year Book, 10 Edw. IV & 49 Hen. VI, at xxvi 57

1946 Op. Ill. Att'y. Gen. 58 64

F. Pollock & F. Maitland, The History of English Law before the Time of Edward I (2d ed. reissued, 1968) 53, 54, 55, 56

Rights of a Father Toward His Illegitimate Child in Illinois 46 Ill. L. Rev. 156 (1951) 60, 65

H. J. Wolff, Background of the Postclassical Legislation of Illegitimacy, 3 Seminar 21 (5 Jurist, 1945) 52, 53

APPENDIX II

NULLIUS FILIUS*

The common law designation of a bastard child as *nullius filius*, or the child of nobody has often been cited in support of a common law rule denying custody to the putative father. In fact, the concept of *nullius filius* is an aberration of the English laws of inheritance which was outside the western tradition of family law, and even in England, had nothing to do with parental rights or child custody. It is only through an unfortunate misunderstanding of family law that it has been cited as an example of the barbaric common law treatment of illegitimate children. Actually, the stigma attached to bastards and their parents was of Medieval moral and religious origin and was in many respects mitigated rather than aggravated by the common law of England.

Roman and Medieval law was interested in the bastard as a factor in the orderly descent of real and personal property through family lines. His custody and welfare were of no significance to the law, except as it was influenced by the Christian Church's crusade against sexual "immorality." In early Rome, the bastard child was, by law, excluded from the family intestacy inheritance. However, there was nothing in Roman law to prevent a father from spontaneously providing for his illegitimate children during his lifetime, through his last will, or by adoption. F. Blume, *Legitimation under Civil Law*, 5 Tul. L.R. 256, 257 (1931). Under the rule of the Emperors, marriage changed from a sacrement to a contract, divorce became easier and, after Augustus, concubinage was recognized by law. *Id.* Naturally the problem of bastard children increased.

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*A Brief history of the origins of the common law concept of *nullius filius* and its relationship to the parental rights of the putative father, prepared by Clara Ann Bowler, staff attorney, Legal Aid Bureau, Chicago, Illinois.

Constantine began what was to become the Christian era of illegitimacy law by, on the one hand, prohibiting the father from passing property to his bastard children by will and, on the other hand, providing for the legitimation of bastards by subsequent marriage of the parents. *Id.*; see also, H. J. Wolff, *The Background of the Postclassical Legislation of Illegitimacy*, 3 Seminar 21, 23 (5 Jurist, 1945).

It has been suggested that Constantine and later Christian Emperors were torn

> "between Christian morality which abhorred extra-marital sex relations, and Christian *misericordia*, which sought to alleviate the lot of children born of such intercourse."
>
> H. J. Wolff, *supra*, at 23.

A less charitable view is that Constantine was hypocritically seeking a method of legitimating his own bastard son Cripus, while simultaneously striking a blow against pagan concubinage. At any rate, the late Roman position as codified by Justinian in 539 A.D. was somewhat less severe. Nov. 89, see abridged trans. in F. Blume, *supra*, at 263. Three methods of legitimation were provided: 1) membership in the local senate, 2) marriage to a local senator, and 3) imperial rescript. The right of testate inheritance was restored and an intestacy portion of one-sixth was preserved for legal concubines and bastard children. F. Blume, *supra*, at 258.

Two peculiar characteristics of Justinian's illegitimacy law should be noted. 1) Justinian's provisions applied only to the the issue of lawful concubinage relationships known as *filius naturalis* and not to irregular extra-marital misadventures. 2) Not only was the relationship between man and concubine recognized at Roman law, but a new legal relationship of *filius naturalis* was established between the father and his illegitimate children. Before Justinian, *filius naturalis* was the biological relationship between the father and children who had been given in adoption or dismissed from the family by emancipation. The term *naturalis* had also referred to the relationship between a master and his

slave-child as well as the children of cohabiting slaves. H. J. Wolff, *supra*, at 24. Unlike later English common law, Justinian's statutes gave the biological relationship of a father to his bastard children a formal legal status as *filius naturalis*, at least to the extent that the children were born of a recognized concubinage relationship. This is not to imply, however, that English common law did not recognize the tie between a bastard child and his biological parents in proceedings for maintenance and custody.

Although the Medieval Church eventually outlawed concubinage, the Roman classification of *filius naturalis* who can be legitimated and inherit and "bastards" who cannot, is preserved in the Continental and canon law distinctions between "natural children" and bastards according to the particular relationship which begot them. (For an American example of the Continental Roman approach see La. Civ. Code Ann., Art. 202, 200, 920 (West 1952)). Blackstone justly observed that those illegitimate children who could not be qualified as natural children under Roman law were treated much more harshly than any bastards at English common law. (1 W. Blackstone, Commentaries on the Laws of England, ch. 16, at 454 (Cooley ed., 1879)). It should be further noted that Constantine's policy of simultaneously heaping disabilities upon the products of extra-marital sex relations and mitigating their effect through legitimation proceedings had become the accepted standard for Continental Europe during the Middle Ages and was still in effect at Blackstone's time.

For unknown reasons, England, after the Norman Conquest rejected both the church inspired disabilities of the bastard and the Roman intermediary status of *filius naturalis*. By the 13th century, the King's Courts were consistently holding that a bastard was *filius nullius*, the child of nobody and therefore could not be the heir of either biological parent. 2 Pollock & Maitland, The History of

English Law before the Time of Edward I, at 394 (2d ed. reissued, 1968). Like Justinian's statutes, the King's Courts were primarily concerned with bastards as a probate problem rather than a social problem. Outside of his inability to inherit, the English bastard suffered no disabilities and in a few circumstances was actually favored by the King's law.

In assessing the position of the bastard at common law it is important to remember that he was neither unfree or incompetent by reason of his birth as was his counterpart in France and Germany. 2 Pollock & Maitland, *supra*, at 394. Under Anglo-Saxon and early English law, a bastard born of a bondswoman was considered a serf regardless of his father's status. However, by the 14th Century the King's Courts had adopted the rule that a child takes the status of his father, and a bastard being *filius nullius*, or having no father must always be born free *Id.* at 407. Thus, throughout the High Middle Ages, the legitimate child of an English serf was considered a serf, but his illegitimate child gained freedom with his bastard birth. Pollock and Maitland suggest that the bastard's favorable treatment under English law was

> "[d]ue to no deeper cause than the subjection of England to Kings who proudly traced their descent from a mighty bastard."
>
> 2 Pollock & Maitland, *supra*, at 395

Another explanation may be found in the consistent effort of the King's Courts to rationalize and simplify land holdings and inheritance. A serf was, afterall, only unfree because he was attached to a villenage which he received through inheritance. Absent the villenage, there was no need for the serf; in fact, if he were not free to seek an independent means of livelihood, he would become an unproductive drain on the resources of the manor. Because the Medieval manor was unable to support large numbers of bondsmen who had no land to till, it was ultimately

against the interest of both the lord and the serf family to restrain the freedom of bastards who could never inherit land holdings. Thus, the relentless logic of the King's Courts served to protect the line of descent in villenages in the same manner as it protected more prestigious land tenures.

After barring bastards from taking land as heirs in the interest of simplifying land tenures, it was only logical for the King's Courts to disallow legitimation by subsequent marriage of the parents or adoption. The Courts rationalized their harsh rules on legitimation by the fact English bastards suffered no temporal disabilities as they did on the Continent. Old English custom had allowed parents to legitimate their bastard children by placing them under the cloak which was spread over their parents during the marriage ceremony. It was said that this ceremony was observed when the children of John of Guant and Catherine Swinford were legitimated. However, this custom was not ordinarily accepted by the King's Courts. *Id.*, at 396 Ecclesiastical law also held that children born to parents who subsequently marry were to be legitimated for purposes of succession by their parents' marriage. Despite the rule of the ecclesiastical courts, however, the lords at the Parliament of Merton (20 Hen. III, The Provisions of Merton (1235-36)),

> "[w]ith one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved."

Thereafter legitimation of bastards was prohibited by law until the legitimation statutes of the 20th century.

The attempts of the King's Court to simplify inheritance and land tenure through disinheriting bastards was constantly complicated by the prevelancy of *de facto* marriages which were not valid under ecclesiastical law. Since in England, as well as on the Continent, the Church was the sole arbitrator of the validity of a marriage, 2 Pollock & Maitland, *supra*, at 375-379, its elaborate system of im-

pediments giving rise to an action for annullment was commonly used as a means of divorce. *Id.* at 391, note 5. Ecclesiastical law held that the children born of a marriage entered into in good faith, but in fact barred by an impediment, were legitimate even though the marriage was later annulled. English law was more concerned with whether there ever was a divorce, although up to the 14th century children born before the divorce were not considered bastards. Ultimately, English law made the legitimacy of a child depend upon whether his parents, during their life, were in fact divorced. *Id.* at 374-375, 375 note 3. In a time when the valid marriage was the exception rather than the rule, and the status of children was a very circumstantial question, the King's Court was probably wise in not interjecting the problem into inheritance matters. It was also a measure of the strength of the English King, in an age where secular governments were struggling with the Church for their very existence, that the economically vital law of land tenure was kept out of that ecclesiastical jungle known as marriage law.

Although both the King and the lords of England had an interest in regularizing land tenure by excluding bastards, the lords were not anxious to allow land to escheat to the Crown for want of an heir. Because legitimacy was so uncertain under the marriage law, the King's Courts bent backwards to avoid bastardizing a child. The law presumed every child born to a married woman to be legitimate. Early cases almost never allowed the presumption to be rebutted. Even the later proof of non-access was often rejected. 2 Pollock & Maitland, *supra*, at 396. The question of the legitimacy of a dead man was not referred to the ecclesiastical courts, but instead sent to a jury of men who openly expressed themselves unwilling to "bastardize the dead." Eventually the law evolved that the bastard who enters his father's land as his heir and remains seized of the land throughout his entire lifetime will give a title to his children which cannot be impeached by other heirs of the father even though as a bastard, he could not by law be an heir *Id.* at 379-380.

Thus, the peculiar English rule of law which denied the relationship between a bastard and his father, was derived for purposes of inheritance only. On the one hand, the interest of the Crown and the lords in preserving untroubled family possession of land in the heir, cut off the claims of outside bastard children by denying their right to inherit. On the other hand, the lord's desire to produce an heir and avoid escheat to the Crown prompted the Courts to protect the assumed position of a bastard who was taken in by his father and presented as a legitimate child and heir. Because of the uncertainty of valid marriages under the ecclestiastical law, illegitimacy served as a tactical plea in the King's Courts when possession of land was at issue. If the inheritance was a villenage, one pleaded that he was a bastard to avoid becoming a serf. (See N. Adams, *Nullius Filius*, 6 U. Tor. L.J. 361, 378-380 (1946); N. Neilson, 47 Selden Society Year Book, 10 Edw. IV & 49 Hen. VI, at xxvi.) If the land was free, rival heirs pleaded illegitimacy against the heir in order to oust him from the heirship. (For example see, *Chamber v. Chamber*, 33 Selden Society Year Books, 5 Edw. II, at 161 (1312); 36 Selden Society Year Books, 7 Edw. II, at 95 (1313); N. Adams, *supra* at 365-374 (1946)).

The concept of bastards as a burden on the State rather than a private probate matter did not appear in England until the poor laws of Elizabeth I. The common law action of bastardy, now usually referred to as "paternity," was first set forth in 18 Eliz. I, ch. 3 (1575-76). The legislative purpose was stated as follows:

> "Concerning Bastards begotten and born out of lawful Matrimony, (an Offense against God's Law and Man's Law) the said Bastards being now left to be kept at the charges of the parish where they be born, to the great Burden of the same Parish, and in defrauding of the Relief of the impotent and aged true poor of the same Parish, and to the evil Example and Encouragement of lewd Life." 18 Eliz. I, ch. 3 (1575-76)

The statute went on to provide for punishment of mothers and "reputed Fathers" who abandoned their bastard children or refused to support them. It is noteworthy that 18 Eliz. I, ch. 3 presumed a duty on the part of both fathers and mothers to support their bastard children. The statute did not purport to create a new duty or relationship, but merely to force parents who did not perform their legal duty to maintain their bastard children to reimburse the State when it was obligated to perform their duty for them.

Moral language to the contrary not withstanding, the primary purpose of the legislation appears to be relief from the economic burden imposed on the parish by the maintenance of abandoned bastard children. The custody of such children was not particularly important and left to the discretion of the Justice ordering the payment. 18 Eliz. I, ch. 3 (1575-76).

The economic purpose of bastardy proceedings was reenforced by later amendments expanding the liability of the putative father to the State. The introduction to this amendment read as follows:

> "Whereas the Provisions of an Act made on the 18th year of the reign of Queen Elizabeth concerning Bastards begotten and born out of Lawful Matrimony, are found to be inadequate to the Purposes of indemnifying Parishes against the Charges and Expenses incurred by the apprehending and securing of the reputed Father, and also by the obtaining of the Order of Filiation, And whereas it is expedient that such charges and Expenses should be borne and discharged by the adjudged reputed Father of such Bastard Child or Children . . . ."
> 49 Geo. III, ch. 68 (1809)

The concept of *filius nullius* was clearly not preceived as a denial of the parent's duty to support his illegitimate children. In particular, it was no deterrant to the parish when it sought to recover the expense of maintaining abandoned children from their reputed father. Neither statute makes any mention of a possible inconsistency in recovering sup-

port payments from the parents of a "child of nobody" or even jailing them if they did not cooperate.

Blackstone, far from denying the existence of parental rights in a bastard, clearly recognized a natural tie between bastard children and their parents which gave rise to the duty of maintenance.

> "For, though bastards are not looked upon as children to any civil purpose, yet the ties of nature, of which maintenance is one, are not so easily dissolved and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter. The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances, was neither consonant to nature, nor reason; however profligate and wicked the parents might justly be esteemed." 1 Blackstone, *supra*, ch. 16, at 458

Blackstone saw the purpose of marriage and legitimacy in the modern sense as

> "being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong." *Id.* at 454

Roman law legitimation procedures were perceived as a mere fiction to obtain inheritance by legitimating adults; and Blackstone believed the English rule was better because it forced the parents to marry before the child was born, thereby providing for his maintenance during infancy. (*Id.* at 455) Obviously this is somewhat of an after the fact rationalization of the English lords' determination to keep the impractical ecclesiastical marriage law out of land tenure questions, but it does show an increased concern with the welfare and maintenance of bastard children.

However, when Blackstone recites the rule that bastards are *nullius filius*, he is careful to refer to inheritance matters only. He goes so far as to hedge over whether a bas-

tard should be described as having no line of ancestry at all or merely no "inheritable" ancestry.

> "Bastards are incapable of being heirs . . . are held to be *nullius filii* . . . Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently none of the blood of the first purchaser; and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord." 2 Blackstone, *Id.*, ch. 15, at 247.

The common law concepts of ancestry for inheritance purposes, parental rights for guardianship over property and the issue of custody of the child have been hopelessly confused by Modern observers. At English common law, the father had the sole rights of a parent over the property, of his legitimate children as well the testamentary right to appoint a guardian in place of a surviving mother. He also had the sole right to custody. (1 Blackstone, *supra*, at ch. 16) Because exclusive custody rights followed paternal descent and property guardianship rights in the case of legitimate children, modern writers have illogically assumed that because the putative father had no "parental rights" to guardianship over property or to testamentarilly provide for his children's guardianship, he also had no claim to custody. (See, *Rights of a Father Toward His Illegitimate Child in Illinois*, 46 Ill. L. Rev. 156 (1951)). Much of this misinterpretation arises from the tendency of Modern American writers to confuse the common law concept of guardianship as a pecuniary interest in the ward's estate with the Modern "guardianship of the person" which concerns itself with the welfare of the child. (For an example of the Modern concept of guardianship of the person see Ill. Rev. Stat. ch. 37, Sec. 701-11 (1969).

English caselaw, however, indicates that the question of custody at common law was considered independently of both the line of descent for inheritance purposes (*nullius filius*) and parental rights as expressed in property and testa-

mentary guardianships. For example, the mother of a bastard, although not considered a parent for purposes of inheritance or guardianship had a recognized "natural" right to custody.

> "In a reported case Maule, J . . . is to have asked whether the mother of an illegitimate child was anything but a stranger to it . . . the judge in making the observation must have been referring only to the strict legal rights as to guardianship. In many cases the law recognizes the right of a mother to the custody of her illegitimate child." *Queen v. Nash,* 10 Q.B. 454 (1883)

A number of decisions returned a bastard to its mother when removed by the father by force or deceit even though she was not considered a parent either. *Rex v. Soper,* 5 Term. R. 278 (1793); *Rex v. Hopkins,* 7 East 579 (1806). But where the father had custody of a bastard child fairly, the courts would *not* remove it on the grounds that he had no "parental rights" *Rex v. Moseley,* 5 East 224 note (1804?).

The earliest bastardy legislation governing the territory which later became Illinois was "An Act for the better securing the paiment of Levies, and restraint of vagrant and idle people; and for the more effectual discovery and prosecution of persons having bastard children; and for making better provisions for the poor." Hening; Va. Stat. 1727, ch. 7, at 212. The section relating to bastards exposed the mother to fine or corporal punishment for abandoning a bastard child. The distinguishing factor about this statute is that the bastardy provision follows a rather modern neglect provision which enables the court to certify children, whose parents

> "shall be adjudged incapable of supporting and bringing up such child . . . by reason of his, her or their idle, dissolute, and disorderly course of life or that they neglect to take due care of the education and instruction of such child or children, in christian principles . . ."

and give them to the churchwardens of the parish to bind out to service or apprentice.

Kent recognized a common law neglect action which, unlike its British equivalent, does not appear to require an estate or trust for the courts of equity to take jurisdiction. J. Kent, 2 Commentaries on American Law, pt. iv, Sec. 29, at 194 (2d ed., 1832). Kent flatly states that,

> "the rule that a bastard is *nullius filius*, applies only to the case of inheritance." *Id.* at 214.

He links the duty of the father to support his bastard child to his right to custody in the absence of objections from the mother.

> "The father of a bastard child is liable upon his implied contract, for its necessary maintenance, without any compulsory order being made upon him, provided he has adopted the child as his own, and an asquiesced in any particular disposition of it. The adoption must be voluntary, and with the consent of the mother, for the putative father has no legal right to the custody of a bastard child, in opposition to the claim of the mother . . . She has a right to the custody and control of it as against the putative father, and is bound to maintain it as its natural guardian, though, perhaps, the putative father might assert a right to the custody of the child as against a stranger." *Id.* at 215-216).

Kent perceived the custody of bastard children as an issue between the putative father and the natural mother. His statement about the father's liability for maintenance after voluntary adoption can be better understood in the context of state legislation like that of Illinois' 1827 Bastardy Act. It should also be remembered that American adoption proceedings in Kent's day were more in the nature of contractual arrangements between the parents and the adopting party than an action in the best interest of the child. (S. Breckinridge, The Family and the State, 358-361 (1932)) Illinois' Bastardy Act provided that a father's liability for

the maintenance of his illegitimate child was dependent on his right to take custody of the child if he so desired.

> "That said reputed father, after giving bond with approved security, to the court of probate in said county, conditioned for the suitable maintenance of any such child, for the term aforesaid, shall be permitted to take charge and have the control of his said child; and from the time of the said father taking charge of such child, or should the mother refuse to surrender the said child, when so demanded by the said father, then and from thenceforth the said father shall be released and discharged from the payment of all such sums or sums of money as may thereafter become due against the father, for the support, maintenance, and education of any such child." An Act to provide for the maintenance of Illegitimate Children, 1827, in Ill. Stat. Laws, 1839 at 332.

In 1845, Abraham Lincoln successfully defended a putative father who was attempting to relieve himself of his liability under the above statute by demanding custody of an illegitimate child with the full knowledge that the mother would refuse. The Illinois Supreme Court "reluctantly" allowed him to pursue this course of action with the warning that if the child was turned over to him he would

> "thereafter during [its] minority become bound for [its] maintenance, support, and education, in the same manner as though [it] had been born in lawful wedlock . . . the legislature did not intend that, when he had once so chosen to demand it of the mother, that his duties towards [it] should cease at the expiration of the period of seven years, the time limited in his bond for its support, and then be at liberty to thrust it forth upon the world's charity, friendless and unprotected." *Wright v. Bennett,* 7 Ill. 587 (1845).

This provision was later amended to restrict the father's right to demand custody of children under 10 years. Ill. Laws 1871-72, at 423, 426; Sec. 13. In addition, the Juve-

nile Court was authorized by a statute of 1899 to take jurisdiction over any child who is "destitute or homeless or abandoned or dependent upon the public for support" Ill. Laws 1899, at 131, 132. Dependent children as well as those who "whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child" (Ill. Laws 1899, at 132) could be placed in a foster home or institution by the court regardless of the claims of their parents, legal or putative.

However, it was the custody provision of the Illinois Bastardy Act which led the General Assembly to pass legislation expressly prohibiting the putative father from taking custody except through an adoption proceeding, Ill. Laws 1949, at 344. In 1945 the rights of a putative father to custody of his bastard child were statutoraly defined as follows:

> "The reputed father of a bastard child shall not have the right to the custody or control of such child, if the mother is living and wishes to retain such custody and control, until after it shall have arrived at the age of ten years, unless, upon petition to the circuit court of the county in which the mother resides, it shall on full hearing of the facts in the case, after notice to the mother, be made to appear to the judge of said court that said mother is not a suitable person to have control and custody of such child." Ill. Rev. Stat., ch. 17, Sec. 13 (1945).

That year the Adoption statute was amended to omit any references to "illegitimate" or "born out of wedlock" from the adoption petition. At the same time, the petition was required to state the name of the parents and of "the person or organization having the legal custody of such child." Ill. Laws 1945, at 10, 15. An Attorney General's opinion (1946 Op. Ill. Att'y. Gen. 58) held that the adjudicated father's limited custody rights under the Bastardy Act entitled him to notice before the child could be adop-

ted. Further the Attorney General believed that "reputed father" as used in the Bastardy Act included all putative fathers whether they had been adjudicated under the statute or not. This meant that an illegitimate child could not be adopted until a guardian with power to consent to an adoption had been appointed.

At the next convenient legislative session in 1949, the Illinois General Assembly attempted to resolve the difficulty by eliminating the putative father's rights to custody by positive legislation. Ill. Laws 1949, at 344. Apparently the chilling effect of this legislation on putative fathers who were willing to take custody of their illegitimate children but who couldn't meet the rigid standards of a modern adoption proceeding was not considered. One commentator noted that Illinois was the only state which statutorily prohibited the putative father from obtaining custody save through an adoption proceeding. *Rights of a Father Toward His Illegitimate Child in Illinois,* 46 Ill. L. Rev. 156 (1951). He suggested that Illinois had "come the full circle back to the common law situation." *Id.* at 158

Such an evaluation overlooks the indifference of Ancient and Medieval law to the physical custody of children. It misinterprets the intent and effect of the concept of *nullius filius.* Finally, it fails to take into account the effect of the Modern Juvenile Court's jurisdiction over "dependent" and "neglected" children on the rights of the putative father. Far from returning to the common law situation, Illinois has reduced the putative father to a lower position than he had at common law. It has rejected the natural and biological ties between a child and his biological father; ties which have been, to some extent, recognized by the law ever since the time of Justinian.

APPENDIX III

RELEVANT STATUTES AND DECISIONS OF OTHER JURISDICTIONS

Few states have specifically considered the issue of whether the unwed father who has voluntarily acknowledged, supported and established a familial relationship with his children is accorded the status of a parent or the right to their custody and control upon the death of the mother.

Those states which by judicial decision and/or statute specifically define (in a context relevant to custody and control of children) the unwed father who has acknowledged, supported and established a familial relationship with his children as a "parent" before and including or after the mother's death are as follows:

Alabama:	Ala. Code, Title 34, § 89 (1958) (Desertion and Non-Support); *Law v. State*, 238 Ala. 428, 191 So. 803 (1939).
North Carolina:	N.C. Gen. Stat., § 49-15 (1969) (Bastardy Act).
Kansas:	Kan. Stat. Ann., § 38-802 (1964) (Juvenile Code).

Those states which by judicial decision and/or statute specifically exclude (in a context relevant to custody and control of children) the unwed father who has acknowledged, supported and established a familial relationship with his children from the definition of a "parent" are as follows:

Florida:	Fla. Stat. Ann., § 39.01 (1964) (Juvenile Courts); *Clements v. Banks*, 159 So.2d 892 (App. 1964).
Georgia:	Ga. Code Ann., § 74.203 (1964) (Parent and Child).

Illinois:	Ill. Rev. Stat., Ch. 37, § 701-14 (1969) (Juvenile Court Act).
North Dakota:	N.D. Cent. Code, § 32-36-35 (1960) (Illegitimacy).
South Dakota:	S.D. Compiled Laws Ann. § 25-8-46 (1967) (Paternity Proceedings)
Tennessee:	Tenn. Code Ann., § 36-236 (1970).
Wisconsin:	Wis. Stat., § 48.02 (1967) (Children's Codes)
Wyoming:	Wyo. Stat. Ann., § 14-53 (1957) (Termination of Parental Rights).

Those states which by judicial decision and/or statute specifically hold that the unwed father who has acknowledged, supported and established a familial relationship with his children has a superior right to the custody and control of the children, at least upon the death of the mother, are as follows:

Arizona:	Ariz. Rev. Stat. Ann., § 14-846 (1956) (Guardian and Ward); *Caruso v. Superior Court*, 100 Ariz. 167, 412 P.2d 463 (1966).
California:	*In re Guardianship of Smith*, 42 Cal.2d 91, 265 P.2d 888 (1954).
Louisiana:	The father has a right to the custody of "natural" children. Natural children are illegitimate children whose parents *could* have married at the time of conception and who have been acknowledged by their father. La. Civ. Code. Ann., Art. 202, 256 (West 1952).
Minnesota:	*In re Shady*, 264 Minn. 222, 118 N.W.2d 449 (1962); *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965).

Mississippi:	*Aycock v. Hampton*, 84 Miss. 204, 36 So. 245 (1904).
New Jersey:	*In re Guardianship of C.*, 98 N.J. Super, 474, 237 A.2d 652 (1967).
North Carolina:	N.C. Gen. Stat., § 49-15 (1969) (Bastardy Act).
Ohio:	Ohio Rev. Code Ann., § 2105.18 (Baldwin 1964) (Illegitimate Children).
Pennsylvania:	*Commonwealth ex rel. Harper v. Fuller*, 142 Pa. Super. 98, 15 A.2d 518 (1940); *Commonwealth ex rel. Kevitch v. McCue*, 165 Pa. Super. 49, 67 A.2d 582 (1949).
Texas:	*Templeton v. Walker*, 179 S.W.2d 811 (Tex. Civ. App. 1944).
Utah:	*In re State in Interest of M.*, 476 P.2d 1013 (Utah S. Ct. 1970).
Washington:	Wash. Rev. Code, § 26.24.190 (1967) (Filiation Proceedings); *State ex rel. Smith v. Superior Court*, 23 Wash. 2d 357, 161 P. 2d 188 (1945); *Wade v. State*, 39 Wash. 2d 744, 238 P.2d 914 (1951).

Those states which by judicial decision and/or statute specifically hold that the unwed father who has acknowledged, supported and established a familial relationship with his children does *not* have a superior right to the custody and control of the children upon the death of the mother are as follows:

Florida:	*Clements v. Banks*, 159 So.2d 892, (App. 1964).
Georgia:	*Toole v. Gallion*, 221 Ga. 494, 144 S.E. 2d 360 (1965).

Illinois:	Ill. Rev. Stat., Ch. 106¾, § 62 (1969) (Paternity Act); *Stanley v. Illinois*, 45 Ill. 2d 132, 256 N.E. 2d 814 (1970).
Maryland:	*Butler v. Berry*, 210 Md. 332, 123 A.2d 453 (1956).
Wisconsin:	Wis. Stat. Ann., § 48.02 (1958) (Children's Code).